91-1832

Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

POLING CHANG,
EXECUTRIX OF THE ESTATE OF HAN CHANG,

Petitioner,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether naming Dr. Han Chang, a deceased plaintiff, instead of naming his executrix, was sufficient to satisfy the specificity requirement of Rule 3 (c) of the Federal Rules of Appellate Procedure.

LIST OF PARTIES

The caption identifies the petitioner as Dr. Han Chang's widow Poling Chang. The respondent is Argonne National Laboratory. Dr. Han Chang's executrix, Poling Chang, seeks a writ of certiorari as his representative.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Poling Chang, Dr. Han Chang's executrix, respectfully requests that a writ of certiorari issue to review the orders of the Seventh Circuit Court of Appeals issued in the above entitled proceedings.

OPINIONS BELOW

The orders of the Court of Appeals for the Seventh Circuit are unpublished and are printed in the appendix hereto.

JURISDICTION

The orders of the Seventh Circuit Court of Appeals dismissing the appeal of Dr. Han Chang were entered on September 3, 1991 and October 9, 1991. The Court of Appeals denied petitioners' motion for reconsideration on October 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Dr. Han Chang, personally pursued his national origin discrimination claims against respondent Argonne National Laboratory until the time of his death. His wife, Poling Chang, thereafter named executrix of his estate, was substituted as his representative. She participated in the trial of his claims. At trial, Dr. Chang's

claims were decided against him. A timely appeal to the Seventh Circuit Court of Appeals was taken on June 27, 1991.

On July 12, 1991, the Seventh Circuit, *sua sponte*, issued an order requesting that Dr. Han Chang file a memorandum "stating why this appeal should not be dismissed for lack of jurisdiction as to Han Chang." On July 25, 1991, counsel for petitioners filed his memorandum opposing dismissal and contemporaneously filed a motion to amend the notice of appeal or in the alternative to substitute Poling Chang as the named appellant.

On September 3, 1991, the Seventh Circuit dismissed without opinion the appeal of Han Chang as well as the appeals of his four co-plaintiffs for failure to comply with Rule 3 (c) of the Federal Rules of Appellate Procedure. App. 1a. Counsel for Han Chang and his co-plaintiffs moved for reconsideration. On October 9, 1991, the Seventh Circuit vacated the order of September 3, 1991 reinstating the four appeals of Han Chang's co-plaintiffs but leaving the dismissal of Han Chang for lack of jurisdiction to stand. App. 3a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents an issue of the reasonable application of Rule 3 (c) of the Federal Rules of Appellate Procedure as interpreted by this Court in *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988). The Seventh Circuit has adopted a literal compliance standard for its application. This Court has rejected such a standard. Dr. Chang's case points up this difference, and therefore he must seek review from this Court for the reinstatement of his appeal.

Petitioner maintains that based on the entry in the Civil Docket Entry Sheet, Dr. Han Chang was still the named plaintiff to pursue appeal at the time the Notice of Appeal was filed. It is for that reason that the Notice of Appeal was filed in his name rather than the name of his representative. A year earlier, on July 17, 1990, the District Court entered an order substituting his executrix, Mrs. Chang, as a party plaintiff. As of June 27, 1991, the date the Notice of Appeal was filed, Dr. Han Chang was listed as the named plaintiff with Poling Chang listed as "proposed". App. 6a. In preparing the Notice, counsel relied on the docket sheet.

For the Seventh Circuit to dismiss Dr. Chang's appeal and then to deny his widow leave to amend or to be substituted ignores the history of Rule 3 (c), the principles developed by this Court in *Torres*, and the practice of other Courts of Appeal.

A. THE DECISION OF THE SEVENTH CIRCUIT DISMISSING DR. HAN CHANG'S APPEAL FOR FAILURE TO COMPLY WITH THE SPECIFICITY REQUIREMENT OF RULE 3 (c) CONFLICTS WITH THE REASONING OF THIS COURT.

The lack of specificity at issue in this case is the omission of a reference to Dr. Chang's widow as executrix of his estate. The question is one of first impression. The Notice of Appeal specified "Dr. Han Chang" alone. App. 1a. The Seventh Circuit concluded that such a failure violates the specificity requirement of Rule 3 (c). Their conclusion is at variance with this Court's opinion in *Torres* and the history of Rule 3 (c).

According to the Seventh Circuit, the specification of Dr. Han Chang instead of his widow as his representative in the Notice of Appeal was a jurisdictional defect. Rule 3 (c) requires "punctilious, literal, and exact compliance". The case reference is omitted in the order of dismissal but may be found in its earlier opinion, *Allen Archery, Inc.* v. *Precision Shooting Equip. Inc.*, 857 F.2d 1176, 1177 (7th. Cir. 1988) as cited in *Hartford Cas. Ins. Co.* v. *Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990). The standard of "punctilious, literal, and exact compliance" is the Seventh Circuit's announced policy and has been applied consistently against litigants who have deviated in the slightest respect.

This Court's opinion in *Torres* lays down different standards for reviewing the specificity of a party designation under Rule 3 (c). Rule 3 (c) provides in pertinent part that a notice of appeal "shall specify the party or

parties taking the appeal". The rule was amended to add that an appeal "shall not be dismissed for informality of form or title of the notice of appeal". As this Court noted, the Advisory Committee to Rule 3 warned that courts should "dispense" with literal compliance in cases in which it can not be fairly exacted. *Torres*, at 2408. Further, this Court found that the ruling in *Foman* v. *Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962) stands for the principle "that the requirements of the rules of procedure should be liberally construed" and that "mere technicalities" should not stand in the way of consideration of a case on its merits". *Torres*, at 2408. The inquiry, therefore, on compliance with the specificity requirement of Rule 3 (c) is whether construing the rule liberally "the litigant's action is the functional equivalent of what the rule requires". *Torres*, at 2409.

With *Torres* as guidance, it is clear that Dr. Chang's executrix has complied with Rule 3 (c). Unlike the unsuccessful litigant in *Torres*, the petitioner in this case has specified a name. The name is sufficient to identify whose layoff claim is being appealed. It was Dr. Chang who was laid off, brought suit, and now appeals. The name provided in the notice of appeal is incomplete, not listing his estate and executrix, but there can be no doubt what is lacking is at best "technically at variance with the letter of a procedural rule". *Torres*, at 2409.

The Seventh Circuit's resort to literal adherence to Rule 3 (c) is directly contrary to the reasoning of this Court. To allow the Seventh Circuit to apply Rule 3 (c) harshly in this case and future cases as it promises to do

will curtail the beneficial operation of the federal rules of procedure.

B. THE DECISION OF THE SEVENTH CIRCUIT DISMISSING DR. HAN CHANG FOR FAILURE TO COMPLY PUNCTILIOUSLY WITH THE SPECIFICITY REQUIREMENT OF RULE 3 (c) CONFLICTS WITH THE REASONING OF OTHER COURTS OF APPEAL.

The Seventh Circuit interprets and applies Rule 3 (c) differently than other Circuit Courts of Appeal. Such differential treatment ignores this Court's understanding that the specificity requirement of Rule 3 (c) be liberally construed allowing the filing of the functional equivalent. Instead of determining whether the name designation gives "fair notice of the specific individual or entity seeking to appeal", the Seventh Circuit requires nothing less than absolute strict compliance.[1]

Other Circuits do not apply Rule 3 (c) with the literal-mindedness endorsed by the Seventh Circuit. In *Brown* v. *Palmer*, 915 F.2d 1435 (10th Cir. 1990), a case directly analogous to this case, the Tenth Circuit found jurisdiction even though the notice of appeal at issue failed to specify the capacity of the litigant. The appellant, a United States Army colonel, noticed his appeal in his

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[1]The Seventh Circuit's position has been reiterated in *Allen Archery Inc.*, above; *Barnett* v. *Stern*, 909 F.2d 973 (7th Cir. 1990); *Baucher* v. *Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332 (7th Cir. 1990); *FTC* v *Army Travel Service*, 875 F.2d 564 (7th Cir. 1989).

own name alone and not in his official capacity. The action had been filed against him solely in his official capacity. The Tenth Circuit found fair notice was given that the United States was the true appellant. See, *King* v. *Otasco*, 861 F.2d 438 (5th Cir. 1988) (failure to designate the capacities in which a party appeals does not render notice of appeal ineffective).

In *Masquerade Novelty* v. *Unique Industries*, 912 F.2d 663 (3rd Cir. 1990), the Third Circuit found a notice of appeal sufficiently specific by reference to other documents filed by appellant and its attorney during the pendency of the appeal. The Third Circuit looked for the functional equivalent of fair notice not only in the wording of the notice of appeal itself, but in the "attorney appearance form and a civil information statement". *Id.*, at 665. Similarly in this case, any ambiguity in using the name of the deceased plaintiff could have been resolved by referring to the Appearance Form and the Certificate of Interest filed by his attorneys in the Seventh Circuit on July 8, 1991. Both refer to "Dr. Han Chang by Poling Chang". Such additional information would not have left either opposing counsel or the court in doubt as to the identity of the party appealing, yet such an inquiry would not do under the literal standard adopted by the Seventh Circuit.

Finally three Circuits have found sufficient specificity where only a reference to all "defendants" was stated in the notice of appeal. Under the Seventh Circuit's literal compliance standard, no such finding could result. These opinions can be found as follows: *Association of American Medical Colleges* v. *Cuomo*, 913 F.2d 55 (2nd Cir.

1990); *National Center For Immigrants' Rights, Inc.* v. *I.N.S.*, 892 F.2d 814 (9th Cir. 1989); *Ford* v. *Nicks*, 866 F.2d 865 (6th Cir. 1989).

Without question, the Seventh Circuit stands alone in its harsh and narrow-minded approach to Rule 3 (c) issues. Other Circuits have followed the guidance of *Torres* and applied Rule 3 (c) as liberally construed. Under the reasoning found in their opinions, Dr. Han Chang's appeal should be reinstated and his appeal should be considered along with the appeals of his co-plaintiffs. It does not speak well of a unified federal system where a litigant's appeal rights are extinguished in one Circuit while in others review would be given the merits of the appeal.

CONCLUSION

For the foregoing reasons, petitioner Poling Chang, the executrix of Dr. Han Chang's estate, respectfully requests that this court grant a Petition For Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 3, 1991

Before

Hon. William J. Bauer, Chief Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Han Chang, et. al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91-2490 v.	)	
Argonne National Laboratory, Defendant-Appellee.	)	No. 86 C 6304 James B. Moran, Judge.

The notice of appeal in this matter does not comply with the requirements of Rule 3 (c) of the Federal Rules jurisdiction over this matter. The caption and body lists "Han Chang," who deceased, as plaintiff, and Poling Chang, his executrix, is the actual party against whom judgment was entered by the district court. Rule 3 (c) requires "punctilious, literal and exact compliance."

IT IS ORDERED that this appeal be dismissed for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 9, 1991

Before

Hon. William J. Bauer, Chief Judge

Hon.

Hon.

Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Han Chang, et. al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91-2490	v.	No. 86 C 6304
Argonne National Laboratory, Defendant-Appellee.	)	James B. Moran, Judge.

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR RECONSIDERATION" filed herein on 9/20/91, by counsel for the plaintiffs.

2. "DEFENDANT-APPELLEE'S MOTION TO STRIKE" filed herein on 9/23/91, by counsel for the defendant.

3. "PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANT-APPELLEE'S MOTION TO STRIKE" filed herein on 10/1/91, by counsel for the plaintiffs-appellants.

The court, on its own motion, ORDERS that the order of 9/3/91 is VACATED and this appeal is REINSTATED as to plaintiffs Ivan V. Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain and Josip Vresk. The motion for reconsideration is DENIED as to Dr. Han Chang and is DENIED as moot as to the remaining plaintiffs.

Briefing will proceed as follows:

1. The brief and required short appendix of the appellants will be due by 11/11/91.

-over-

2. The brief of the appellee will be due by 12/11/91.

3. The reply brief of the appellants, if any, will be due by 12/26/91.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. HAN CHANG, DR. MOHAN JAIN and JOSIP VRESK,	)	
Plaintiffs,	)	No. 86 C 6304
vs.	)	Judge Moran
ARGONNE NATIONAL LABORATORY,	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. HAN CHANG, DR. MOHAN JAIN and JOSIP VRESK, Petitioners, hereby appeal to the United States Court of Appeals for the Seventh Circuit from Memorandum Opinions and the final judgment entered in this action on April 24, 1991 and May 31, 1991.

Date: 6/27/91

/s/Mark LeFevour
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Supreme Court, U.S.
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ARGONNE NATIONAL LABORATORY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Poling Chang, who was not named in the notice of appeal below, has standing to petition this Court for a writ of certiorari.

2. Whether the petition for writ of certiorari was timely filed.

3. Whether the court of appeals correctly dismissed the appeal of Dr. Han Chang for lack of jurisdiction because Dr. Han Chang, who was named in the notice of appeal below, was not a party when the trial court entered the judgment from which Dr. Han Chang appealed.

LIST OF PARTIES

The notice of appeal to the Seventh Circuit listed Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Han Chang, Dr. Mohan Jain and Josip Vresk as appellants. The appeal of all parties except Dr. Han Chang currently is pending in the court of appeals.

The sole appellee in the court of appeals was Respondent Argonne National Laboratory.[1]

[1] Pursuant to Rule 29.1, Respondent submits the following information: Argonne National Laboratory is owned by the United States Department of Energy and operated under contract by The University of Chicago.

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Argonne National Laboratory, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's order dismissing the appeal of Dr. Han Chang.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. pp. 1a-5a) are unreported. The opinion of the district court entering judgment for Respondent is reported solely as *Von Zuckerstein, et al. v. Argonne National Laboratory*, No. 86 C 6304, 1991 U.S. Dist. LEXIS 7334 (N.D. Ill. June 1, 1991).

JURISDICTION

The order of the court of appeals (Pet. App. pp. 1a-2a) dismissing Dr. Han Chang's appeal was entered on September 3, 1991. On September 20, 1991, Dr. Han Chang filed an untimely petition for rehearing (styled "Motion for Reconsideration"), which was denied by the court of appeals on October 9, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). As Respondent discusses more fully below, the Petition for Writ of Certiorari should be dismissed for lack of jurisdiction because Poling Chang, who filed the petition, was not a party to the judgment of the court of appeals and because the petition was not timely filed.

STATEMENT OF THE CASE

For 17 trial days, Petitioner Poling Chang sat at counsel's table (with the same two attorneys who later pursued the Seventh Circuit appeal herein and the Petition for Writ of Certiorari herein) as the employment discrimination case of Petitioner and her four co-plaintiffs was tried. Indeed, she took the witness stand under the direct examination of counsel Mark Leroy LeFevour. Poling Chang never worked for Respondent. Her husband, Dr. Han Chang, did, but he died before this case came to trial. Accordingly, on July 17, 1990, the district court entered an order, pursuant to motion by counsel for the plaintiffs, substituting Poling Chang as party plaintiff in lieu of Dr. Han Chang. The July 17, 1990 Order clearly and concisely stated: "Plaintiff Han Chang's motion to substitute executrix Poling Change [sic] as party plaintiff is granted." Accordingly, as of July 17, 1990, Dr. Han Chang ceased to be a party to this case.

On May 31, 1991, the district court issued a Memorandum and Order concluding: "For the reasons stated herein and on April 24, 1991, this court finds for the defendant and against the plaintiffs, and enters judgment for the defendant." The caption of the Memorandum and Order correctly listed as plaintiffs "IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, *POLING CHANG*, DR. MOHAN JAIN and JOSIP VRESK." (Emphasis added).

On June 27, 1991, Mark Leroy LeFevour, counsel for Petitioner in this Court and one of the two attorneys who represented plaintiffs at trial, filed a notice of appeal which stated, both in its caption and in its text, that Dr. Han Chang was appealing the district court's judgment in favor of Argonne. No mention was made of an appeal by Poling Chang.

On July 12, 1991, the court of appeals entered an order stating that "the order appealed from may not be appealable as to Han Chang" and that "Poling Chang has not appealed." The Court ordered the plaintiffs-appellants to submit "a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction as to Han Chang."[2]

In response, Dr. Han Chang filed such a memorandum,[3] relying principally (as Petitioner does here) on a purported error in the Civil Docket Sheet as a reason for proceeding

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[2] The Court noted that a "motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement."

[3] For convenience and brevity, this Brief will refer to various legal papers being filed by Dr. Han Chang after his death, even though such is both a physical and legal impossibility, whenever the style of the paper filed indicated that it was purportedly filed by Dr. Han Chang.

as he did, but nowhere suggesting how the court of appeals could exercise jurisdiction over an appeal by a deceased person not a party to the district court judgment. Dr. Han Chang also filed a document styled "Dr. Han Chang's Motion to Correct or Amend the Notice of Appeal to Reflect the Substitution of Poling Chang as His Personal Representative, or Alternatively, to Substitute Poling Chang as the Named Appellant" (the "Motion to Amend").

On September 3, 1991, the court of appeals dismissed Dr. Han Chang's appeal, stating in relevant part:

> The notice of appeal in this matter does not comply with the requirements of Rule 3(c) of the Federal Rules of Appellate Procedure, and therefore the court has no jurisdiction over this matter. The caption and the body lists "Han Chang," who deceased, as plaintiff, and Poling Chang, his executrix, is the actual party against whom judgment was entered by the district court. Rule 3(c) requires "punctilious, literal and exact compliance."

(Pet. App. pp. 1a-2a).

The order entered by the court of appeals appeared to dismiss the appeal not only as to Dr. Han Chang but also as to the four plaintiffs named in the notice of appeal. Accordingly, on September 20, 1991, these parties and Dr. Han Chang filed a document styled "Motion for Reconsideration." The four plaintiffs urged the court of appeals that "any deficiency in Dr. Chang's notice of appeal should not affect the right of [these four plaintiffs] to prosecute their appeals." Dr. Han Chang merely repeated the arguments made in his Motion to Amend.

On September 23, 1991, Respondent moved to strike the "Motion for Reconsideration" because it was in fact a petition for rehearing which was not filed within the 14-day

time period prescribed by Rule 40 of the Federal Rules of Appellate Procedure. On October 9, 1991, the court of appeals "on its own motion" vacated its order of September 3, 1991 as to the four plaintiffs only and denied Dr. Han Chang's "Motion for Reconsideration." (Pet. App. pp. 3a-5a).

On January 13, 1992, this Court received a petition for writ of certiorari which identified as petitioners "Dr. Han Chang and Poling Chang, executrix of the estate of Han Chang." The Clerk returned the petition because it failed to comply with several of this Court's rules. The Clerk also noted, "It appears as though the caption of the petition is incorrect since Mr. Han Chang is deceased and a deceased person cannot file a petition in this Court." Despite the Clerk's instruction that corrected copies be returned promptly, in accordance with Rule 33.7, Petitioner did not mail the pending petition until 22 days after the date of the Clerk's letter.[4]

REASONS FOR DENYING THE WRIT

I.

Poling Chang has no standing to petition this court for a writ of certiorari because she was not a party to the judgment in the court of appeals.

Under 28 U.S.C. § 1254(1), a judgment of the court of appeals may be reviewed by this Court "[b]y writ of certiorari granted upon the petition of any *party* to any civil or criminal case. . . ." (Emphasis added). It goes without saying that someone like Poling Chang "who is not a party to a . . . judgment is not entitled to appeal therefrom."

[4] For this reason alone, the petition should be dismissed.

In re Leaf Tobacco Board of Trade, 222 U.S. 578, 581 (1911); *see also Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Poling Chang never appealed the trial court's judgment against her. Nor did the court of appeals enter any judgment to which she was a party.

Accordingly, Poling Chang has no standing to petition this Court for a writ of certiorari, and her petition should be dismissed.

II.

The petition was not filed within 90 days after the entry of the order dismissing Dr. Han Chang's appeal.

Poling Chang's petition also must be dismissed because she failed to file it within 90 days after the entry of the court of appeals' order dismissing Dr. Han Chang's appeal, as required by 28 U.S.C. § 2101(c) and Rule 13.1 of this Court. The order Poling Chang would have this Court review was entered on September 3, 1991, but her petition was not received by the Clerk until January 13, 1992, some 132 days later.

The petition for rehearing filed by Dr. Han Chang was not sufficient to toll the filing deadline under Rule 13.4 because the petition was not "timely filed." Nor did the court of appeals' order of October 9, 1991, serve to extend the deadline for filing in this Court. When, as here, there is no timely petition for rehearing, the entry of an additional order by the court of appeals does not affect the filing deadline in this Court unless the later order changes in some material way the court of appeals' earlier decision. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). As this Court held:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. [Footnotes omitted].

Id.

Here, the Seventh Circuit's order of October 9, 1991, vacated, on the court's motion, dismissal of the appeals of the four plaintiffs named in the notice of appeal. The order left undisturbed the dismissal of Dr. Han Chang's appeal. At that point, the clock was still running for Petitioner because no timely petition for rehearing had been filed. The order of October 9, 1991, did not reset the clock because it made no change at all, let alone a substantive change, in the court's earlier order.

Significantly, counsel for Poling Chang was apparently well aware that the 90 days for filing the Certiorari Petition ran from the September 3, 1991 Seventh Circuit order and not from the October 9, 1991 order. On November 5, 1991 (long after receipt by the parties of the October 9, 1991 order), counsel filed a motion with the Seventh Circuit on behalf of the remaining four appellants entitled "Motion For Extension of Time Within Which To File Appellant's Brief And Appendix." A copy of said Motion with attachment is set forth in the Respondent's Appendix hereto. In the sworn affidavit of attorney Mark (Leroy) LeFevour attached thereto, counsel stated:

> 6. The Affiant is currently engaged in other litigation and appeals which have consumed a significant amount of the Plaintiffs-Appellants' counsel's time. These other cases are as follows:
>
> * * *
>
> C. *Poling Chang v. Argonne National Laboratory*, No. 91 2490, appeal from the United States District Court for the Northern District of Illinois, No. 86 C 6304; *petition for Certiorari due in the Supreme Court by December 3, 1991.* [Emphasis added].

December 3, 1991 is actually 91 days after the issuance of the September 3, 1991 Seventh Circuit order, but this one-day miscalculation notwithstanding, it is clear that counsel was aware that the Petition filing deadline was not tolled by the October 9, 1991 Seventh Circuit order.

Accordingly, Poling Chang's petition for writ of certiorari is out of time and should be dismissed.

III.

The court below followed the letter and the spirit of *Torres*.

Contrary to Petitioner's contention, the court of appeals did not misread this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), when it held that the notice of appeal failed to comply with Rule 3(c) of the Federal Rules of Appellate Procedure ("Rule 3(c)"). Rather, it is Petitioner who seeks to turn *Torres* on its head by suggesting that this Court there laid down a more relaxed standard than the Seventh Circuit's requirement of "punctilious, literal and exact compliance" with Rule 3(c). (Pet. App. p. 2a).

Rule 3(c) requires that a notice of appeal "specify the party or parties taking the appeal." In *Torres*, this Court held that the rule means exactly what it says. If Poling

Chang wanted to appeal the district court's decision, she had only to file a notice of appeal naming herself as an appellant within the time limits set by Rule 4 of the Federal Rules of Appellate Procedure ("Rule 4"). She did not.

Her counsel did file a notice of appeal naming Dr. Han Chang, a non-party at that point, and, in Petitioner's distorted view of *Torres*, that was enough. In support of this dubious proposition, Petitioner relies not on any legal authority but on a docket notation which was allegedly confusing to Petitioner's counsel. This argument is both specious and irrelevant.

Contrary to Petitioner's assertion, there was no confusion in the district court as to the appropriate party. Poling Chang was substituted as a party on her own motion and that substitution was clearly and specifically noted on the civil docket sheet. Poling Chang was introduced to the jury as a party, and she fully participated in the trial. Petitioner's counsel's supposed confusion also is irrelevant in light of this Court's instruction in *Torres* that Rule 3(c) be read literally. The fact that Poling Chang became a plaintiff because her husband died does not forgive the failure to list her on the notice of appeal.

In her petition, Poling Chang suggests that the erroneous naming of Dr. Han Chang in the notice of appeal was a "mere technicality" which the court of appeals should have ignored. But this Court in *Torres* expressly rejected this view, holding:

> [R]ule 3(c) was amended in 1979 to add that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." This caveat does not aid petitioner in the instant case. The *failure to name a party in a notice of appeal is more than excusable "informality;" it constitutes a failure of that party to appeal.*
>
> * * *

> . . . We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeal were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.
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> * * *
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> . . . The Advisory Committee's caveat that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted," . . . is not to the contrary. The examples cited by the Committee make clear that it was referring generally to the kinds of cases later addressed in the 1979 amendment to Rule 3(c), which excuses "informality of form or title" in a notice of appeal. [Footnote omitted]. Permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.
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> * * *
>
> . . . [I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. . . . But although a court may construe the Rules liberally in determining whether they have been complied with, *it may not waive the jurisdictional requirements of Rules 3 and 4*, even for "good cause shown" under Rule 2, if it finds that they have not been met.

487 U.S at 314-17 (emphasis added).

Petitioner also suggests that naming Dr. Han Chang was some form of harmless error because his "name is suffi-

cient to identify whose layoff claim is being appealed." (Pet. p. 6). This is precisely the approach rejected by this Court in *Torres*:

> [P]etitioner argues that courts of appeal should apply "harmless error" analysis to defects in a notice of appeal. This argument misunderstands the nature of a jurisdictional requirement: a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court.

487 U.S. at 317 n.3.

Dr. Han Chang's motion to amend the notice of appeal was filed by the wrong party in the wrong court at the wrong time. Dr. Han Chang was not a party to the lawsuit when the motion was filed and thus had no standing to request that the court of appeals allow amendment of the notice of appeal. Poling Chang filed no notice of appeal, so she also lacked standing to request any relief in the court of appeals. She could have sought relief in the *district court* under Appellate Rule 4(a)(5), but she chose not to do so.

The Motion to Amend also ran directly contrary to *Torres*. *Torres* does not permit a party to create jurisdiction where none exists by amending, in the appellate court, a defective notice of appeal by substituting a party not named in the notice of appeal. *Kowaleski v. Director, OWCP, United States Department of Labor*, 879 F.2d 1173, 1175-77 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990). In *Kowaleski*, as here, a notice of appeal was filed on behalf of an individual who died before the case was adjudicated below. When the court discovered this and requested a response as to why the case should not be dismissed, the appellant's counsel, as here, responded by filing a motion to substitute the executor of the original

appellant's husband's[5] estate. *Id.* at 1174-75. Rejecting the motion, the court held:

> The Supreme Court recently held that Appellate Rules 3 and 4 . . . constitute a "single jurisdictional threshold," such that *the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal deprives the court of appeals of jurisdiction over the unnamed parties. Torres* . . . , 108 S. Ct. 2405, 2407. . . .
>
> * * *
>
> . . . [T]he Court held that, although the rules may be liberally construed, a court "may not waive the jurisdictional requirements of Rules 3 and 4 if it finds that they have not been met." *Torres*, 108 S. Ct. at 2409. . . .
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> * * *
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> As the Court recognized in *Torres, a motion for leave to amend a notice of appeal to include unnamed parties must be filed [in the district court] within the time limits for filing a notice of appeal set forth in Rule 4.* Failure to timely file a motion to amend deprives the court of jurisdiction over the unnamed parties. *Torres*, 108 S. Ct. at 2407.

Id. at 1175-77 (emphasis added).

Accordingly, since the Seventh Circuit did nothing more than properly follow *Torres*, and since *Torres* clearly precludes the relief sought by Poling Chang, there is no reason for this Court to grant the writ.

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[5] The appellant had died before her husband, who also died before the case was adjudicated below. *Id.* at 1174-75.

IV.

This Court need not resolve any split among the circuit courts of appeal because no such split exists.

The Seventh Circuit has held that a party who is not named in the notice of appeal is out of court. No other circuit has held to the contrary. Each of the cases Petitioner cites in support of her alleged split among the circuits is distinguishable on its facts from this case and from the Seventh Circuit precedent on point. In cases analogous to those on which Petitioner relies, the Seventh Circuit decisions *agree completely* with those in other circuits.

Petitioner points first to a line of cases in which courts of appeal allowed parties to proceed even though the notices of their appeals failed to specify the parties' *capacities*.[6] These cases are inapposite because in each case, the party seeking to appeal (unlike Poling Chang) was, in fact, named in the notice of appeal. Faced with an analogous situation, the Seventh Circuit came to the same conclusion. *See Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990) (court held it had jurisdiction over plaintiff's appeal, even though the notice of appeal referred to the plaintiff by a name different from that used in the trial court, because the different names were "alternative names for the same entity"). The cases cited by Petitioner might have allowed the court of appeals to take jurisdiction over an appeal by Poling Chang using some alias or business name, and they might have allowed Poling Chang to prosecute her appeal without specifying that she was executrix of Dr. Han Chang's estate. These cases, however, do not (and cannot) relax Rule 3(c)'s *jurisdictional requirement* that the *party appealing* be named in the notice of appeal.

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[6] Petitioner cites *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990) and *King v. Otasco*, 861 F.2d 438 (5th Cir. 1988).

Petitioner next turns to a line of cases in which courts held that notices of appeal sufficiently named the parties appealing through use of generic terms such as "plaintiffs" or "defendants." Here again, the Seventh Circuit has reached the same conclusion.[7] As the Seventh Circuit has held, "[A] notice of appeal is sufficient *where the caption names all of the parties seeking to appeal* and where the text in the body *sufficiently identifies the parties* through the use of a generic term such as 'plaintiffs' or 'defendants.' " *Hartford Casualty, supra*, 913 F.2d at 423 (emphasis added). Here, the caption and the body of the notice of appeal named Dr. Han Chang, not Poling Chang, thus precluding the court of appeals from finding that the notice sufficiently identified Poling Chang as an appellant.

Petitioner's contention that the Third Circuit would decide this case differently also is based on a factually distinguishable decision. Petitioner relies on *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663 (3d Cir. 1990), for the proposition that a court may look at documents other than the notice of appeal to determine the identity of the party appealing. (Pet. p. 8). In *Masquerade Novelty*, the Third Circuit had before it a notice of appeal which was ambiguous only because it stated, "Walter Z. Steinman, attorney for Plaintiff in the above captioned matter, hereby appeals. . . ." *Id.* at 664. The Court noted that two other documents filed *within the*

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[7] *Compare Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 423 (7th Cir. 1990) with *Association of American Medical Colleges v. Cuomo*, 913 F.2d 55, 55-56 (2d Cir. 1990), *National Center for Immigrants' Rights v. I.N.S.*, 892 F.2d 814, 815-17 (9th Cir. 1989), *Ford v. Nicks*, 866 F.2d 865, 867, 869-70 (6th Cir. 1989) and *Minority Employees of Tenn. Dept. of Employment Security, Inc. v. Tennessee*, 901 F.2d 1327 (6th Cir.), *cert. denied*, 111 S.Ct. 210 (1990).

30-day period of Rule 4 specified that Masquerade Novelty was the appellant. *Id.* at 664-65. Here, the notice of appeal did not identify anyone as attorney for Poling Chang, and the supposedly clarifying documents on which Petitioner relies were filed *more than 30 days* after the district court's judgment.[8] As this Court made clear in *Torres*, a notice of appeal must comply with the requirements of both Rule 3 and Rule 4. Thus, documents filed outside the 30-day period are irrelevant.

The Third Circuit's decision in *Kowaleski*,[9] which involved a situation almost identical to that presented here, precludes any contention that the Third Circuit would decide this case differently than the Seventh Circuit did. The circuits are as one in their adherence to this Court's instruction that Rule 3(c) be read literally. Accordingly, there is no reason for this Court to grant the writ.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

March 27, 1992

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[8] Petitioner informs the Court that these documents were filed on July 8, 1991. (Pet. p. 8).

[9] *See* discussion *supra*.

RESPONDENT'S APPENDIX

[FILED NOVEMBER 5, 1991]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2490

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN and JOSIP VRESK, Plaintiffs-Appellants, v. ARGONNE NATIONAL LABORATORY, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 86 C 6304 James B. Moran, Judge Presiding

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE APPELLANT'S BRIEF AND APPENDIX

NOW COME the Plaintiffs-Appellants, IVAN VON ZUCKERSTEIN, DR. D. RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK, by and through their attorneys, MARK L. LE FEVOUR and JOHN L. GUBBINS, and pursuant to Federal Rule of Appellate Procedure 26(b) and Circuit Rule 26, move this Honorable Court for an extension of time within which to file the Appellant's brief and appendix, and in support thereof, state as follows:

1. The brief and required short appendix of the Appellants is due by November 11, 1991. Based on the facts in the attached Affidavit, neither of Plaintiffs-Appellants'

counsel, with due diligence, and giving priority to the preparation of the brief, will be able to file the brief on or before November 11, 1991.

WHEREFORE, the Plaintiffs-Appellants respectfully request that this Court grant them an extension of time until December 27, 1991 within which to file their brief and appendix.

Respectfully submitted,

/s/ John L. Gubbins
John L. Gubbins

/s/ Mark L. Le Fevour
Mark L. Le Fevour

John L. Gubbins,
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Mark L. Le Fevour
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708-990-4200

/ivan

STATE OF ILLINOIS
COUNTY OF COOK—SS.

AFFIDAVIT

MARK LE FEVOUR, on oath, hereby deposes and states the following:

1. That he is an attorney licensed to practice law in the State of Illinois, and is admitted to practice before the United States District Court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit, and the United States Supreme Court.

2. That during the first three weeks of April, 1991, the Affiant and John L. Gubbins appeared before Judge James B. Moran in the trial of the matter currently on appeal.

3. That the Affiant and John L. Gubbins are currently in the process of reviewing the record transcript and all of the exhibits filed in the record in order to prepare and present the Plaintiffs-Appellants' appeal to this Court.

4. The matter under appeal involves complex litigation in that the transcript of proceedings is approximately 2,500 pages long, the exhibits in the record on appeal are contained in seven separate volumes and over 400 documents were marked as exhibits during the course of the trial. The main issues on appeal concern factual issues that were raised in the Plaintiffs' case in chief, and which merit review and scrutiny on appeal, since the trial court entered a directed verdict on the evidence presented by the Plaintiffs.

5. The legal issues involved in this appeal were the subject of two recent Supreme Court cases involving the applicability of Section 1981 to employment discrimination cases (*Patterson*) and the definition of who meets the criteria under a case of national origin discrimination.

6. The Affiant is currently engaged in other litigation and appeals which have consumed a significant amount of the Plaintiffs-Appellants' counsel's time. These other cases are as follows:

APPELLATE CASES

A. *7th Circuit—Alfred Fiorenzo et al. v. Sam Nolan et al.*, No. 91 1460, appeal from the U.S. District Court for the Northern Distrct [sic] of Illinois, No. 86 C 9261—Reply brief of Plaintiff-Appellants to brief of Defendant-Appellant Samuel W. Nolan; due November 8, 1991.

B. *McCann et al. v. City of Chicago, et al.*, Nos. 91-3261 and 91-3267, appeal from the United States District Court for the Northern District of Illinois, No. 89 C 2879; Appellant's brief due November 12, 1991.

C. *Poling Chang vs. Argonne National Laboratory*, No. 91 2490, appeal from the United States District Court for the Northern District of Illinois, No. 86 C 6304; petition for Certiorari due in the Supreme Court by December 3, 1991.

D. *Illinois Appellate: Singh vs. Illinois Department of Professional Regulation*, Appellate No. 91-1019, appeal from the Circuit Court of Cook County, No. 90 CH 10519.

UPCOMING JURY TRIALS

Federal—John Auriemma et al. vs. Fred Rice, No. 84 C 1224, pending before Judge Holderman. (The trial is set for January 13, 1992; pretrial order due by November 25, 1991, expert's depositions and motions in liminie [sic] are still outstanding and to be drafted on or before November 22, 1991.)

State Court—Bowman et al. vs. Bank of Hickory Hills, et al., 87 L 21456 in the Circuit Court of Cook County, Illinois. Anticipated jury trial November 20, 1991.

7. The Affiant has made diligent efforts to read and summarize the record on appeal. At this time he has read and summarized approximately 50% of the trial transcript and a majority of the exhibits in the appellate record. As this appeal requires a substantial amount of factual input, the careful summarizing and recitation of the trial record is paramount to the Plaintiffs-Appellants' brief. Plaintiffs' counsel has recently retained a law clerk to assist him in the review and summary of the record.

8. The matters noted above take priority over the appeal in this case in that the *Fiorenzo* reply is due November 8, 1991; the *McCann* brief is due November 12, 1991, (it involves an equal protection claim against the City of Chicago); the *Auriemma* case has been pending for eight years, has been before this Court on three separate occasions, and before the United States Supreme Court. The deadlines set by Judge Holderman in *Auriemma* are firm and he expects all of the parties to comply with them. The *Bowman* trial date has been set in the Circuit Court of Cook County for several months and it is anticipated at this time that the Affiant will participate in that jury.

9. Similarly, Affiant's co-counsel is currently engaged in the following litigation:

A. Preparing a supplemental brief to the brief of the amicus curae [sic] in *Billish et al. vs. City of Chicago, et al.*, No. 90-1650 (7th Circuit) appeal from the United States District Court for the Northern District of Illinois, No. 87 C 8731.

B. Currently preparing an Appellant's brief in *City of Chicago et al. vs. Matchmaker Realty Center, Inc.*, currently pending before the 7th Circuit.

C. Mr. Gubbins is also co-counsel in the *Auriemma vs. Rice* and *Chang vs. Argonne Laboratory*, cases noted above.

D. Mr. Gubbins is currently preparing an appeal on *Jacobs vs. Mundelein College* currently pending in the Illinois Appellate Court.

10. Extreme hardship will result to counsel's ability to represent both the *McCann* plaintiffs and the *Von Zuckerstein* plaintiffs, if an extension is not granted. The hardship would be that neither party would get the full benefit of counsel's undivided attention to their appeals before this Court. It is a similar situation for Mr. Gubbins in the cases of *Billish vs. Chicago* and *Chicago vs. Matchmaker* that if an extension is not granted, these clients will not receive the representation to which they are entitled.

11. The Affiant and Mr. Gubbins are ready, willing and able to prosecute the *Von Zuckerstein* appeal. By coincidence, several deadlines conflict with the dealine [sic] set by the Court for the filing of the *Von Zuckerstein* appeal. If granted leave until December 27, 1991, the Plaintiffs-Appellants will have their brief and Appendix on file either by that date or prior to that date.

FURTHER, AFFIANT SAYETH NOT.

/s/ Mark Le Fevour
Mark Le Fevour

SUBSCRIBED AND SWORN to
before me this 4th day
of November, 1991.

/s/ Janet A. Bowler
Notary Public

[Seal]

Mark L. Le Fevour
Callahan, Fitzpatrick, LaKoma & McGlynn
1200 Jorie Boulevard
Oak Brook, IL 60521
708-990-4200

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of Motion For Extension of Time Within Which To File Plaintiff-Appellants' Brief And Appendix to be served upon counsel for Defendant-Appellee by depositing same in the U.S. Mail at 1200 Jorie Boulevard, Oak Brook, Illinois, first class postage prepaid, before the hour of 5:00 p.m. on November 4, 1991, addressed as follows:

R. Clay Bennett
Keck, Mahin & Cate
8300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6589

/s/ Mark Le Fevour
Mark Le Fevour